

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ANTONIO SHONTEL HINES,
Grievant,**

v.

Docket No. 2018-0723-DOC

**DIVISION OF NATURAL RESOURCES,
Respondent.**

DISMISSAL ORDER

Grievant, Antonio Shontel Hines, was employed by Respondent, Division of Natural Resources. On November 9, 2017, Grievant filed this grievance against Respondent protesting his termination from employment. For relief, Grievant requested “that my tenure with the State of WV continue, but NOT with The Division of Natural Resources.”

On November 22, 2017, Respondent, by counsel, filed its *Motion to Dismiss* asserting the grievance must be dismissed as untimely and as Grievant had requested relief wholly unavailable from the Grievance Board. On the same date, Grievance Board staff notified Grievant by email that any response to the motion must be made in writing by December 8, 2017, and that a decision on the motion would be made based on the submissions of the parties. On December 8, 2017, Grievant responded by email asserting that his grievance was not untimely as, per his termination letter dated October 2, 2017, the effective date of his dismissal from employment was October 18, 2017. Grievant did not address Respondent’s contention that the relief he seeks is unavailable. Grievant appears *pro se*. Respondent appears by counsel, Jane Charnock, Assistant Attorney General.

Synopsis

Grievant was employed by Respondent as an Accounting Technician 3. Grievant grieved his termination from employment. Respondent moved to dismiss the grievance as untimely-filed and because Grievant had requested a remedy wholly unavailable through the grievance process. The grievance was untimely-filed and Grievant offered no excuse for the untimely filing. The only remedy Grievant sought was employment with an agency other than Respondent, which is a remedy wholly unavailable through the grievance process. Accordingly, the grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as an Accounting Technician 3.
2. By letter dated October 2, 2017, Grievant was notified that he was terminated from his employment effective October 18, 2017.
3. Grievant filed his grievance on November 9, 2017.
4. The only remedy Grievant requested was employment with an agency other than Respondent.

Discussion

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*,

Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

Grievant argues that his grievance was not untimely as he filed within fifteen days of the effective date of his dismissal from employment. The time-period for an employee to grieve dismissal from employment begins with the receipt of the letter notifying the employee of his/her dismissal from employment, not the effective date of the dismissal from employment. See *Palmer v. Dep't of Health and Human Res.*, Docket No. 2017-2308-DHHR (June 30, 2017). Therefore, Grievant had fifteen days from his receipt of the letter to grieve his dismissal from employment. Grievant received the letter on October 2, 2017, so was required to file his grievance by October 24, 2017. Even if Grievant were correct in his argument that he had fifteen days from the effective date of his dismissal, he would have been required to file his grievance by November 8, 2017, and the grievance was filed on November 9, 2017.¹ The grievance is untimely.

“A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11. The only relief Grievant requested is “that my tenure with the State of WV continue, but NOT with The Division of Natural Resources.” Grievant seeks a remedy the Grievance Board has no authority to grant. The grievance process is in place to resolve grievances between employees and their State employers. “‘Grievance’ means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . .” W. VA. CODE § 6C-2-2(i)(1). “‘Grievance’ does not mean . . . any other matter in which the authority to act is not vested with the

¹ Grievant stated that November 7, 2017, should not be counted as it was not a working day. This assertion is incorrect. November 10, 2017, was a holiday, Veteran’s Day Observed; November 7, 2017, was not a holiday.

employer." W. VA. CODE § 6C-2-2(i)(2). "Employer" means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section. W. VA. CODE § 6C-2-2(g). It is the Division of Natural Resources that was Grievant's employer. The Division of Natural Resources has no authority to act to place Grievant in a position with another State agency, nor does the Grievance Board. Therefore, the grievance must also be dismissed as Grievant has requested a remedy wholly unavailable through the grievance process.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

3. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

4. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11.

5. Respondent proved the grievance was untimely-filed and Grievant offered no excuse for the untimely filing.

6. The only remedy Grievant sought was employment with an agency other than Respondent, which is a remedy wholly unavailable through the grievance process.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: January 12, 2018

Billie Thacker Catlett
Chief Administrative Law Judge